



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C APPEAL NO 14 OF 2020

SOPHIA KEMUNTO OMESSA.....APPLICANT

VERSUS

CHRISTINE KWAMBOKA NYAKWARA.....1ST RESPONDENT

MICHAEL MAYAKA NYAKWARA.....2ND RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 22.3.2021 the Applicant filed an application seeking the following orders:

a) Spent

b) That this Honourable Court do order a stay of proceedings of Taxation of Bill of Costs in Keroka CMELC No. 2/2019, Sophia Kemunto Omesa V Christine Kwamboka Nyakwara and Michael Mayaka Nyakwara more particularly the intended taxation of the Bill of Costs and subsequent execution pending the hearing and determination of the application.

c) That this Honourable Court do order stay of the proceedings in Keroka CMELC No. 2/2019, Sophia Kemunto Omesa V Christine Kwamboka Nyakwara and Michael Mayaka Nyakwara more particularly the intended taxation of the bill of costs and subsequent execution pending the hearing and determination of the Appeal.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the Supporting Affidavit of Faraday Nyangoro sworn on the 22nd March, 2021.

3. In the said affidavit he depones that he was instructed to represent the Applicant in Keroka CMELC No. 2/2019. The matter proceeded for hearing and judgment was delivered on 15.10.2020 dismissing the Applicant's suit. Thereafter the Applicant instructed him to appeal against the judgment and he filed a Memorandum of Appeal dated 11.11.2020.

4. He depones that the Respondents have filed their Bill of Costs which was fixed for taxation on 16.4.2021. He therefore seeks a stay of proceedings as he believes that the Applicant has a meritorious appeal.

5. The application is opposed through the Replying Affidavit of Michael Mayaka Nyakwara, the 2nd Respondent sworn on 9th April 2021. He depones that he is aware that the Applicant has filed an appeal but the said appeal has not yet been admitted. He is of the view that this court cannot stay the assessment of Party and Party costs awarded by the court unless execution proceedings have commenced.

6. He depones that the Applicant has not demonstrated that he stands to suffer substantial loss if execution is not stayed. He further depones that the Applicant has not furnished any security for costs. He faults the Applicant's advocate for swearing the affidavit in support of the application on matters of fact, giving the impression that the application has been prompted by the advocate without the Applicant's participation.

7. The application was canvassed by way of written submissions and both parties filed their submissions, which I have considered.

ISSUES FOR DETERMINATION

8. The following issues arise for determination.

(i) Whether the Applicant has met the threshold for stay of execution pending the appeal.

(ii) Whether this court can issue a stay of execution against a negative order.

ANALYSIS AND DETERMINATION

9. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

It is clear that the 3 conditions set out in Order 42 Rule 6 must be met before the court can grant a stay of execution pending appeal.

10. In the case of **Electro Watts V Aliona Finance Kenya Limited (2018) eKLR** the court observed that the use of the word AND connotes that all the three conditions must be met simultaneously. The court will therefore proceed to determine whether the Applicant has met the three conditions.

Substantial Loss

11. The Applicant has not demonstrated by way of affidavit or otherwise that she stands to suffer substantial loss. In the instant case, the Respondent merely intends to recover the costs of the suit. It cannot be argued that if the Respondents are paid their costs, the appeal shall be rendered nugatory.

12. In **Kenya Shell Limited V Kirubi 1986 KLR 410**, Plat Ag JA observed that:

“If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money”.

13. The Applicant has not placed any material before me to show that she will suffer substantial loss. In the circumstances, I see no reason why the Respondents should be denied from enjoying the fruits of their judgment.

Security for costs

14. The second condition which the Applicant is expected to satisfy is that she should provide security for costs. The Applicant's Supporting Affidavit is silent on the issue of security for costs.

Unreasonable delay

15. The third condition is that the application ought to be filed without unreasonable delay. The taxation of the Bill of Costs which the Applicant seeks to stay is dated 12th February 2021, while this application was filed on 22.3.2021, therefore the application was filed without any delay.

From the above analysis it is clear that the Applicant has not met all the conditions for stay of execution.

16. With regard to the second issue, it is trite law that a stay of execution cannot be granted in respect of a negative order.

While considering a similar application in **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another**, the court relied on **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

The court further observes as follows:

*“To further emphasize the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.*

17. In the instant case the Applicant’s suit was dismissed and therefore there is nothing to be stayed. All in all, I am not persuaded that the Applicant has demonstrated that she deserves an order of stay.

18. Accordingly, the application is lacking in merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE